88-820

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IRON WORKERS REINFORCED RODMEN, LOCAL 201,
Petitioner,

v.

JESSIE BERGER, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Under Title VII of the Civil Rights Act of 1964, can a plaintiff class make out a prima facie disparate impact case with respect to a particular employment practice by showing a bottom-line underrepresentation of blacks as the end result of a multi-component selection procedure but without proving that the employment practice under attack caused that result?

2. Can a plaintiff class prevail on a disparate impact case challenging an employment practice which is based on a legitimate business interest if the class does not prove that an alternative selection device would be less discriminatory but equally as effective in serving the business goals at stake?

3. Can a plaintiff class which attacks a facially neutral, objective selection device prevail on a disparate treatment challenge by proving a bottom-line underrepresentation of blacks absent any evidence or finding that the selection device was adopted for a discriminatory purpose?

LIST OF PARTIES TO THE PROCEEDINGS

The following persons or entities are the parties to the proceeding below and their party designation is listed.*

Jessie Berger (Plaintiff)

Randolph Jackson (Plaintiff)

Tommy Kirkland (Plaintiff)

Van Edward Lewis (Plaintiff)

Ronald Tucker (Plaintiff)

Ernest Bellamy (Plaintiff)

Garrett Simmons (Plaintiff)

Willie Lee McMillan (Plaintiff)

Iron Workers Reinforced Rodmen, Local 201 (Defendant)

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Defendant)

Construction Contractors Council, AGC Labor Division, Inc. (Defendant)

Apprenticeship Committee for Iron Workers Reinforced Rodmen, Local 201 (Defendant)

Local Administrative Committee of the National Iron Workers and Employers Training Program (Defendant)

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* Petitioner believes that the Construction Contractors Council, AGC Labor Division, Inc., the Apprenticeship Committee for Iron Workers Reinforced Rodmen, Local 201 and the Local Administrative Committee of the National Iron Workers and Employers Training Program no longer have an interest in this litigation, since all findings of liability against these entities have been reversed.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Iron Workers Reinforced Rodmen, Local 201 respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on April 5, 1988, and the court of appeals' order on appellants' petition for rehearing entered on July 29, 1988.

OPINIONS BELOW

The opinion of the court of appeals entered on April 5, 1988, is reported at 843 F.2d 1395 and is reprinted in the separately bound appendix, Pet. App. 1a.[1] The opin-

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[1] The separately bound appendix ("Pet. App.") was jointly prepared and submitted in support of both this petition and a petition

ion of the court of appeals on appellants' petition for rehearing is reported at 852 F.2d 619 and is reprinted in the separately bound appendix, Pet. App. 88a.

The trial findings of the United States District Court for the District of Columbia (Penn, J.) are unofficially reported at 42 F.E.P. Cases 1161 and are reprinted in the separately bound appendix, Pet. App. 92a. The subsequent remedial order of the trial court is unreported and is reprinted in the separately bound appendix, Pet. App. 156a.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1988, affirming in part and reversing in part the trial findings and subsequent remedial order of the district court. The court of appeals granted a timely petition for rehearing on July 29, 1988, and on that date entered an order and an amending order reversing an additional aspect of the trial court's findings. On October 19, 1988, Chief Justice Rehnquist entered an order extending the time for petitioner to file its petition for writ of certiorari to and including November 17, 1988. That order, No. A-300, is reprinted in the appendix *infra* at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981. The pertinent provisions of Title VII, 42 U.S.C. § 2000e-2(c) and (j), state:

> (c) It shall be an unlawful employment practice for a labor organization—

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for certiorari filed in this case by the International Association of Bridge, Structural and Ornamental Iron Workers on October 26, 1988. The joint appendix, which was also filed on October 26, 1988, bears the number of this earlier filed petition, No. 88-699.

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * * *

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 1981 states:

All persons within the jurisdiction of the United States shall have the same right in every State and

> Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and under 42 U.S.C. § 1981, by eight black construction workers, respondents herein, against petitioner Iron Workers Reinforced Rodmen Local 201 ("the Local"). Jurisdiction in the trial court was invoked under 28 U.S.C. §§ 1343(3-4), 2201 and 2202, and 42 U.S.C. § 2000e-5 (f)(3). "The gravamen of the plaintiffs' complaint," as the court below stated, "is that the preconditions to Union membership in the early 1970s . . . excluded a higher proportion of blacks than whites from Union membership and that these preconditions could not be justified on work-related grounds." Pet. App. 7a. The facts, as found by the courts below, are as follows.

Rodmen are construction workers who handle and position steel rods for reinforcing concrete and other building materials. Pet. App. 4a. The work is a skilled trade which has historically been entered through an apprenticeship training program leading to journeyman status. Pet. App. 38a. At all times pertinent to this case, membership in the Local was limited to journeymen and apprentice rodmen.

Since September, 1972—one month *before* the start of the period at issue in this case—there have been two routes to achieving journeyman status.[2]

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[2] The paths described in text are technically paths to qualifying for a journeyman examination. But "[c]ompletion of one of the programs [described in text] resulted almost automatically in

First, persons under age 31 could become journeymen only by completing a two-year Apprenticeship Program run by a joint labor-management Apprenticeship Committee. Admission to the Apprenticeship Program was limited to persons who possessed a high school diploma.[3] Because only one of the individual plaintiffs who lacked a high school education was under age 31 at any time during the limitations period and because that plaintiff did not claim to have been denied admission or to have been deterred from applying to the Apprenticeship Program as a result of the educational requirement, the court of appeals held that plaintiffs were not entitled to challenge that requirement in this proceeding. Pet. App. 14a-17a.

Second, persons over age 30 were eligible for a Training Program funded by the Department of Labor and administered by a labor-management Training Committee under the supervision of the National Iron Workers and Employers Training Program. The Training Program was an affirmative action program established primarily to allow experienced minority workers to become journeymen rodmen; like the Apprenticeship Program, the Training Program provided a two-year course of instruction, but, unlike apprentices, certain trainees were permitted to take the journeyman exam after six months to one year of classroom instruction. Also, unlike the Apprenticeship Program, there was no educational prerequisite for admission to the Training Program.

For reasons that are unexplained on this record but which may be attributable to the high school diploma requirement which the district court found dispropor-

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Union membership, since virtually all examinees . . . passed the test." Pet. App. 6a.

[3] The high school diploma requirement was eliminated during the pendency of this lawsuit. Pet. App. 5a n.1.

tionately excluded blacks, Pet. App. 124a-28a,[4] during the period 1972-75—the most recent period within the statute of limitations for which plaintiffs presented statistical evidence—blacks comprised only 6 of the 55 graduating apprentices. Pl. Ex. 31, *reprinted in* the appendix *infra* at 2a. Blacks comprised 100% (15/15) of those completing the Training Program. *Id.* The net result was that during the 1972-75 period, 30% (21/70) of those completing one of the two programs were black, whereas blacks were found to comprise 45.1% of those entering the rodman trade, Pet. App. 125a, and 47.7% of experienced rodmen who had not achieved journeyman status, Pet. App. 122a.

Based on these statistics, and notwithstanding the Local's efforts to enable older blacks to become union members through the operation of its affirmative-action Training Program, the courts below held that the Local was guilty of unlawful discrimination against experienced black non-journeymen rodmen. In reaching this conclusion, the court of appeals reasoned as follows.

The court first concluded that the Local's "requirement of classroom training before experienced workers may qualify to enter the ranks of journeymen rodmen" disproportionately disadvantaged blacks. Pet. App. 34a. The court so found by contrasting the racial composition of the groups completing one of the training programs (30% black) with the racial composition of the pool of experienced non-journeymen rodmen (47.7% black). That comparison led the court to conclude that experienced blacks were disproportionately underrepresented among the ranks of those becoming journeymen.[5] Pet. App. 24a-27a.

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[4] The district court based that finding in part on the fact that in the Washington, DC, area—the area from which the Local's members are drawn—in 1970 only 13.8% of white males but 38.3% of black males had failed to complete high school. Pet. App. 124a.

[5] The court found that the 21 blacks who completed the Apprenticeship or Training Programs constituted 16.9% (21/124) of ex-

In attributing this disparity to the training requirement, the court of appeals overlooked two undisputed facts: (1) the underrepresentation of blacks in the aggregate numbers of those completing one of the two programs was due entirely to the high number of whites completing the Apprenticeship Program, a program limited to those with a high school diploma; and (2) the Apprenticeship Program served only younger, inexperienced workers (those under age 31) and no person entering that program in 1972-75—white or black—was an experienced rodman, *see* Pl. Ex. 34, *reprinted in* the appendix *infra* at 3a. Thus, the proportion of blacks in a combined group of graduates most of whom were *inexperienced*—the Apprenticeship Program accounted for over three-quarters of the total completions (55/70), Pl. Ex. 31—and a comparison of that figure with the proportion of blacks in a labor pool of *experienced* workers, served as the predicate for the court of appeals' conclusion that experienced blacks were disproportionately disadvantaged.

Moreover, the court found such an impact even though the *only* experienced workers who were admitted to journeyman status were those completing the Training Program, all of whom were black. And after ruling that the validity of the high school diploma requirement for admission to the Apprenticeship Program was not properly before it, the court of appeals failed to inquire into the effects of that requirement in producing the aggregate disparities on which the court focused.

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perienced black non-journeymen during the three-year period. The difference between this proportion and the comparable proportion for whites (49/146 or 33.6%) was found to be statistically significant. Pet. App. 25a-26a & n.15. This analysis treated inexperienced workers who completed one of the two programs as if they were experienced. Pet. App. 25a n.13.

Having thus found that the classroom training requirement had a disparate impact, the court of appeals went on to hold that requirement to be unlawful. Proceeding on the legal theory that it was defendant's obligation to "justify the racially neutral employment practice as demanded by business necessity," Pet. App. 22a n.8, the court below concluded that the Local's "legitimate, racially neutral interest in limiting the size of [its] membership[] in accord with market demands," Pet. App. 36a, and the Local's equally legitimate interest in excluding "unqualified individuals" from the rodman trade, Pet. App. 40a, did not suffice to justify that requirement.

The court reasoned that because, for a five-month period in 1971, the Local (pursuant to a mandate issued by the International Association of Bridge, Structural and Ornamental Iron Workers to all of its Locals) had permitted experienced rodmen to take a journeyman test without completing a training program, the Local had "hoisted itself on its own petard." Pet. App. 39a. Ignoring the fact that during that six-month "open period" the test that was administered disqualified 64.7% of black applicants but only 29.4% of whites, Pet. App. 121a, the court of appeals asserted that "the Open Period establishes that . . . the [Local] is capable of devising an exam that screens out insufficiently competent applicants for journeyman status." Pet. App. 39a (emphasis omitted). The appellate court thus invalidated the requirement of classroom instruction for experienced workers seeking journeyman status, but left the Local free to "devise a more exacting or thorough exam for rodmen who eschew classroom training to assure that skills (e.g., reading blueprints) learned in the classroom have been learned on the job (so long, of course, as any such 'stepped-up' exam satisfies the bedrock requirements of job-relatedness)." Pet. App. 40a.[6]

[6] The court of appeals went on to hold that the International Association of Bridge, Structural and Ornamental Iron Workers,

REASONS FOR GRANTING THE WRIT

The holding below that "the educational prerequisite—*i.e.*, completion of the Apprenticeship or Training Program—as applied to experienced rodmen who wanted to become members of Local 201 had a disproportionate impact on blacks in violations of Title VII and section 1981," Pet. App. 51a, rests on two legs: first, that plaintiffs' bottom-line statistical analysis of the racial distribution of those who completed one of the two training programs sufficed to indict the "educational prerequisite"; and, second, that although that prerequisite served legitimate nondiscriminatory interests of the Local, the requirement was nonetheless unlawful because of its supposed disparate impact.[7] As we show below, each leg of

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the international union with which the Local is affiliated, was vicariously liable for the violation of Title VII and § 1981 found to have been committed by the Local. Pet. App. 51a-64a. The International has filed a separate petition, No. 88-699, challenging that holding.

The court of appeals dismissed a number of other claims against the Local and against other defendants as well; plaintiffs have not sought review of those aspects of the appellate court's decision.

[7] There is an occasional passage in the court of appeals' decision which suggests that the court viewed this case as a disparate treatment case or at least that the appellate court did not distinguish between the two theories. *See* Pet. App. 34a-36a. Indeed, the Local was held liable under 42 U.S.C. § 1981. Nonetheless, as noted in text, the court of appeals ultimately stated its holding solely in disparate impact terms. Pet. App. 51a. Moreover, the court's entire analysis focused on the impact of a "race-neutral" requirement, *viz.*, the requirement of classroom training. The court did not purport to find that this requirement was established or maintained for a discriminatory purpose, and indeed its findings are all to the contrary. Pet. App. 17a n.5, 38a-40a & n.22, 42a-43a, 63a-64a, 76a n.33.

Although, for the above reasons, we believe this case is properly viewed as a disparate impact case, we have raised, as a third question, the applicability of disparate treatment theory to a case of this type. The court of appeals, in effect, improperly allowed the

that decision is flatly inconsistent with the plurality opinion in *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777 (1988), which was decided several months *after* the appellate court rendered its decision in the instant case.

Ordinarily, given the foregoing, we would suggest that this case be remanded to the court of appeals so that court could reconsider its decision in light of *Watson*. But immediately after deciding *Watson*, this Court granted a writ of certiorari in *Wards Cove Packing Co. v. Atonio*, 108 S. Ct. 2896 (1988) (No. 87-1387), in order to provide further guidance as to the parameters of the disparate impact doctrine; that case will be argued shortly.

The first leg of the decision below is, as we show below, analytically indistinguishable from the holding of the Ninth Circuit in *Wards Cove*, and thus this Court's decision in *Wards Cove* likely will be dispositive of the first question posed by the appellate court's decision in this case. Pp. 11-14 *infra*. And the second question raised herein—on which the Court in *Watson* split 4-3, with Justice Stevens declining to reach the issue and Justice Kennedy not participating—is one the Court also may reach in *Wards Cove*. Pp. 14-16 *infra*.

Against this background, we believe the sounder course here is to defer action on the instant petition pending the decision in *Wards Cove* and then either remand this case in light of both *Watson* and *Wards Cove* or, alterna-

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disparate impact of a neutral selection criterion to substitute for the requisite element of intent, Pet. App. 35a-36a, contrary to the principles of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360 (1977) and *General Building Contractors v. Pennsylvania*, 458 U.S. 375, 383-91 (1982). *See also Hazelwood School District v. United States*, 437 U.S. 299, 310-11 (1977) (defendant can rebut prima facie statistical case of disparate treatment by showing that claimed discrimination was caused by nonactionable conduct).

tively, if significant questions remain open after *Wards Cove*, to grant the petition in this case as a means of addressing such questions.

I. THE CAUSATION ISSUE

A. In *Watson v. Fort Worth Bank and Trust*, *supra*, a plurality of this Court after joining in a unanimous holding that "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases," 108 S. Ct. at 2787 (plurality opinion); *id.* at 2791 (Blackmun, J., concurring); *id.* at 2797 (Stevens, J., concurring), deemed it appropriate to engage in a "fresh and somewhat closer examination" of the disparate impact doctrine in order to establish or reaffirm "the constraints that operate to keep that analysis within its proper bounds," *id.* at 2788 (plurality opinion). The first such constraint the plurality articulated concerned the type of statistical proof required to establish a disparate impact case; writing for the plurality, Justice O'Connor explained:

> First, we note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. Cf. *Connecticut v. Teal*, 457 U.S. 440 (1982).
>
> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in ques-

> tion has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. . . .

Id. at 2788-89.

The ruling below that the Local's classroom training requirement had a disparate impact on black employees cannot be reconciled with this teaching of *Watson*. As we have seen, that ruling is based entirely on aggregate data which may, in the words of the *Watson* plurality, establish "statistical disparities in the . . . work force," but which does *not* establish "causation" with respect to the classroom training requirement. Rather, the aggregate data on which the appellate court relied, by lumping together the Apprenticeship and Training Programs and by lumping together experienced and inexperienced workers who completed those programs, does not allow for separate analysis of the impact of the classroom training requirement. Moreover, the disaggregated data which plaintiffs themselves introduced establishes that of the experienced, non-journeymen rodmen, blacks were disproportionately *successful* in satisfying the classroom requirement because of the affirmative action program. And that data likewise establishes that the disparity on which the court of appeals focused was the result of the Apprenticeship Program which served younger, inexperienced workers and for which there was a separate admission requirement, *viz.*, the high school diploma requirement. *See supra* pp. 5-7.

Indeed, the instant case dramatically illustrates the wisdom of the *Watson* plurality's emphasis on proof of causation. For the court below has invalidated as discriminatory against blacks a prerequisite for journeyman status which, in fact, excluded only white workers over age 30 since it was only that group for whom no classroom program existed. And the appellate court has prevented the Local from requiring classroom instruction for experienced journeymen even though the disparity

that the court found could have been entirely cured without disturbing that requirement, either by increasing the percentage of inexperienced blacks in the Apprenticeship Program and/or by increasing the size of the Training Program relative to the Apprenticeship Program.

B. In finding the statistical evidence here sufficient to indict the classroom training requirement, the court below proceeded on the same theory as the United States Court of Appeals for the Ninth Circuit in *Wards Cove Packing Co. v. Atonio*, 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988). In that case, like this one, employees were selected through two discrete procedures: a union referral system for cannery workers, and an application process for non-cannery jobs. Just as the Training Program here was predominantly black, the union referral system in *Wards Cove* produced a largely minority cannery work force because most of the members of the union doing the referring were minority; just as most of those completing the Apprenticeship Program here were white, the application process in *Wards Cove* produced a non-cannery work force which was predominantly white.

In *Wards Cove*, as here, the appellate court looked to aggregate statistical data to find a disparate impact; specifically, the Ninth Circuit compared the percentage of minorities in the cannery jobs with the percentage in the non-cannery jobs. Finding "racial stratification by job category," the court of appeals concluded:

> This is sufficient to raise an inference that some practice or combination of practices has caused the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs.

827 F.2d at 444.

Immediately upon deciding *Watson*, this Court granted a writ of certiorari in *Wards Cove* to consider, *inter alia*, whether aggregate data of the type relied on by the ap-

pellate court in the case suffices to make out a disparate impact case. This Court's decision in *Wards Cove* is likely to say a great deal with respect to the validity of the decision below finding that the classroom education requirement had a disparate impact on experienced black workers.

In light of the foregoing, we believe the appropriate course here is to defer action on the instant petition pending the decision in *Wards Cove* and, following that decision, to grant this petition, vacate the judgment below, and remand this case for reconsideration in light of both *Watson* and *Wards Cove*.

II. THE JUSTIFICATION ISSUE

A. After articulating the "causation" requirement, the *Watson* plurality went on to address a "second constraint on the application of disparate impact theory": the " 'business necessity' or 'job relatedness' defense." 108 S. Ct. at 2790. The plurality explained:

> Although we have said that an employer has "the burden of showing that any given requirement must have a manifest relationship to the employment in question," such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary . . . when a plaintiff has made out a prima facie case of disparate impact, *and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons*, the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship." Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be *equally as effective as the challenged practice in serving the employer's legitimate business goals.*

Id. at 2790 (emphasis added) (citations omitted).

Although the court below in the instant case did not, in terms, formulate a "business justification" test, its ultimate holding invalidating the classroom training requirement cannot be reconciled with the *Watson* plurality's discussion of this issue. For the court below acknowledged that the Local's practice of requiring classroom training for journeymen did, in *Watson*'s words, further "legitimate business reasons," yet the court below invalidated that practice absent any proof of a less discriminatory, "equally . . . effective" alternative. Indeed, the court below based its holding entirely on the *theoretical* possibility that a nondiscriminatory test could be devised to assure that would-be journeymen had the requisite knowledge, and that court cavalierly disregarded the Local's unhappy experience in attempting to implement such a test. *See supra* p. 8.

B. In this regard, too, the decision below is of a piece with the Ninth Circuit's decision in *Wards Cove*. Although the court of appeals there did not rule on the business necessity of the various employment practices at issue—that question was remanded to the district court—the Ninth Circuit did state that the statistical evidence sufficed "to place the burden *on the employer* to justify the business necessity of the practices identified by the plaintiffs." 827 F.2d at 444 (emphasis added); *see also id.* at 445 ("What is required is that the defendants prove the business necessity of the nepotism policy"); *id.* at 447 ("[t]he burden must shift to the companies to prove the business necessity of [separate hiring channels]").

The petitioner in *Wards Cove*, *see* Br. for Pet. in U.S. No. 87-1387 at 34-36, 46-47, supported by the United States as *amicus curiae*, *see* Br. for the United States in U.S. No. 87-1387 at 23-29, has urged the Court in effect to resolve the disagreement between the four-Justice plurality and the three-Justice minority in *Watson* and to articulate clear standards to govern the adjudication

of the "justification" phase of a disparate impact case. Should the Court accept that invitation, as the plurality did in *Watson*, *Wards Cove* could present far clearer guidance as to the validity of the holding below in this case on the justification issue. For this reason, too, we believe this case is appropriately held for *Wards Cove*.

CONCLUSION

For the foregoing reasons, the Court should defer action on the instant petition pending decision in No. 87-1387, *Wards Cove Packing Co. v. Atonio*, and, following the decision in that case, the Court should grant the instant petition and either (i) remand this case for further reconsideration in light of *Wards Cove* and *Watson v. Fort Worth Bank and Trust* or, alternatively, (ii) set this case for plenary argument to resolve any questions not reached or resolved in *Wards Cove*.

Respectfully submitted,

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November 17, 1988

APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-300

IRON WORKERS REINFORCED RODMEN, LOCAL 201,
Petitioner

v.

JESSIE BERGER, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 17, 1988.

/s/ William H. Rehnquist
Chief Justice of the
United States

Dated this 19th day of October, 1988.

PLAINTIFF'S EXHIBIT 31

RATE OF ACCESS TO EXAMINATION BY AGE AND RACE

OCTOBER 22, 1972—OCTOBER 21, 1975

	Number in Experienced Pool *	Examinees **	Access Rate
AGE LESS THAN 31			
White	106	49	46.2%
Black	35	6	17.1%
AGE 31 OR OLDER			
White	24	0	0%
Black	75	15	20.0%

* Excludes 6 "other" under 31 and 4 "other" 31 or older.

** Excludes 2 "other" examinees under 31 and 2 "other" examinees 31 or older.

PLAINTIFF'S EXHIBIT 34

NUMBER OF APPRENTICES AND TRAINEES WITH EXPERIENCE AT TIME OF ENTRANCE INTO PROGRAM, OCTOBER 22, 1972— OCTOBER 21, 1975

	Total		Number with Experience		Percentage of Total with Experience	
	White	Black	White	Black	White	Black
APPRENTICES	52	18	0	0	0.0%	0.0%
TRAINEES	3	75	2	13	66.7%	17.3%

NUMBER OF APPRENTICES AND TRAINEES WITH NO ACCUMULATED HOURS OF EXPERIENCE AS OF END OF FISCAL YEAR PRIOR TO ENTRY INTO PROGRAM

	Total		Number with No Experience		Percentage of Total with No Experience	
	White	Black	White	Black	White	Black
APPRENTICES	52	18	49	17	94.2%	94.4%
TRAINEES	3	75	1	57	33.3%	76.0%

Nos. 88-699 and 88-820

Supreme Court, U.S.
FILED
DEC 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO,
Petitioner,

v.

JESSIE BERGER, RANDOLPH JACKSON, TOMMY KIRKLAND, VAN EDWARD LEWIS, RONALD TUCKER, ERNEST BELLAMY, GARRETT SIMMONS AND WILLIE LEE MCMILLIAN,
Respondents.

IRON WORKERS REINFORCED RODMEN, LOCAL 201,
Petitioner,

v.

JESSIE BERGER, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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December 17, 1988

QUESTIONS PRESENTED

1. Did statistical evidence presented on behalf of a class of experienced black rodmen, which identified, as the cause of a statistically significant disparity between the proportion of experienced black and white rodmen who became union members, the requirement that experienced blacks undertake classroom training before being permitted to take an exam for union membership, establish a *prima facie* case of racial discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981, as the courts below ruled?

2. Did the court of appeals correctly hold that defendant unions, which at trial did not argue, or offer any evidence, that their membership practices are based on legitimate business reasons or are justified by business necessity, failed to rebut plaintiffs' *prima facie* case of racial discrimination?

3. Did the court of appeals correctly affirm the district court's ruling that the International Union was liable for racial discrimination when the facts showed that the International Union actively participated in and approved of the discriminatory membership practices implemented by its affiliate, Local 201?

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Nos. 88-699 and 88-820

IN THE

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OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO,
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Respondents.

IRON WORKERS REINFORCED RODMEN, LOCAL 201,
Petitioner,

v.

JESSIE BERGER, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Jessie Berger *et al.*, respectfully request that this Court deny the petitions for writs of certiorari filed by the International Association of Bridge, Structural and Ornamental Iron Workers ("the International") and its affiliated local union, Iron Workers Reinforced Rodmen, Local 201 ("Local 201").[1] The petitions seek review of the decision of the United States Court of Appeals for the District of Columbia Circuit, reported at 843 F.2d 1395, *modified in part on reh'g*, 852 F.2d 619 (D.C. Cir. 1988), which held Local 201 and the International liable for racial discrimination against a class of black rodmen.

[1] By Order dated November 16, the Court granted respondents leave to file their opposition to the petition of the International, which was served on October 26, at the same time they file their opposition to Local 201's petition, served pursuant to an extension on November 17.

STATEMENT OF THE CASE

This case involves the efforts of a class of experienced black rodmen to gain membership in Local 201 and the International. Plaintiffs contended below that defendants' use of classroom training as a prerequisite to being permitted to take a test for union membership denied or delayed membership for qualified black workers. The district court found that defendants had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and 42 U.S.C. §1981 by this practice. After a "meticulous review" of the record (Pet. App. 4a), the court of appeals affirmed the district court's ruling in a detailed *per curiam* opinion (Edwards, D.H. Ginsburg and Starr, JJ.). Pet. App. 1a-87a.

At trial, plaintiffs presented a "straightforward" (Pet. App. 18a) statistical case in support of their claim of racial discrimination. As the district court found, the defendant unions required experienced black rodmen to complete one of two classroom programs (either the Apprenticeship Program for those 30 and under or the Training Program for others) as a prerequisite to taking the test for union membership, which no experienced worker failed. This prerequisite created unnecessary barriers to union membership that disproportionately disadvantaged experienced black rodmen, some of whom had worked more than 10,000 hours in the trade. *See* Pet. App. 17a-18a; Pet. App. 95a-96a, 97a-98a, 101a-102a (Trial Findings 12, 14, 17).

The court of appeals agreed that plaintiffs had demonstrated that the percentage of eligible blacks who became union members (*i.e.*, took and passed the journeyman exam) was lower than the percentage of eligible whites by a statistically significant margin, and thus that the challenged practice had a disparate impact in violation of Title VII. Indeed, the disparity resulting from the challenged practice was so great that the district court found, and the court of appeals affirmed, that defendants also had engaged in disparate treatment in violation of Title VII and had intentionally discriminated against the class in violation of section 1981. Pet. App. 18a-40a, 87a.

Defendants challenged the validity of a number of aspects of plaintiffs' statistical case. The court of appeals rejected those challenges. Pet. App. 27a-40a. The court of appeals, in particular, rejected defendants' claim that plaintiffs had failed to identify the specific practice that was discriminatory:

> Quite simply, defendants once again decline to recognize the thrust of plaintiffs' challenge. The "specific procedure" under challenge is the requirement of classroom training before experienced workers may qualify to enter the ranks of journeymen rodmen. That theory of the case fully satisfies defendants' obvious right to know precisely what is under challenge.

Pet. App. 34a. The court of appeals likewise ruled, contrary to defendants' assertion, that plaintiffs had established a causal connection between the challenged practice and the discriminatory result. Pet. App. 35a-36a.

Defendants made no response to plaintiffs' statistical case apart from the asserted inadequacies which the district court and the court of appeals rejected. The court of appeals observed that "[i]n the typical case, defendants' rebuttal case will likely focus on (1) inadequacies in the plaintiffs' statistical case, or (2) an alternative, more favorable statistical case, or (3) a nondiscriminatory explanation for the statistical disparities." Pet. App. 22a. Defendants, however, did not offer evidence of more favorable statistics. Nor did they offer evidence of a nondiscriminatory explanation for the racial disparities the district court found. *See* Pet. App. 150a-151a (Conclusions of Law 16, 18, 19). Thus, the court of appeals concluded that "[t]he record is, indeed, devoid of *any* affirmative rebuttal case" (Pet. App. 40a, emphasis in original) and affirmed the district court's findings of racial discrimination.

Applying traditional principles of agency law, the court of appeals upheld the district court's conclusion that the International was liable under Title VII because of its active participation in and approval of Local 201's membership procedures. Pet. App. 51a-63a. In addition, the court of appeals affirmed the ruling that the International was liable under section 1981. It held: "[t]his question need not detain us long . . . because . . . [t]he International's support of and participation in the very practices to which the plaintiffs' statistics apply is a sufficient basis from which the intent to discriminate on the part of the International may properly be inferred." Pet. App. 63a.

REASONS FOR DENYING THE PETITIONS

The court of appeals correctly applied established principles regarding proof of racial discrimination and common law agency in affirming the findings of the district court that defendants, "by adopting and implementing the requirement that applicants for union membership complete a Union-supervised educational program, discriminated against the properly certified classes of black plaintiffs in violation of Title VII and Section 1981." Pet. App. 87a. The decision below raises no issue worthy of review.

Local 201 tries in its petition to tie this case to the Court's decision in *Watson* v. *Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988), and the issues presented in *Wards Cove Packing Co.* v. *Atonio*, 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (No. 87-1387). However, nothing in *Watson* warrants further review of the instant case. Nor is there any connection between this case and *Wards Cove* that justifies Local 201's request that the Court defer action on, or grant, its petition. Similarly, the decision below does not conflict with the Court's decision in *Carbon Fuel Co.* v. *UMWA*, 444 U.S. 212 (1979), or national labor policy, as the International contends.

The court of appeals' ruling is nothing more than a routine, yet painstaking review of factual determinations of a trial court. Moreover, the decision of the court of appeals is correct. First, plaintiffs proved that a specific employment practice—the classroom training prerequisite—caused a disparity between experienced blacks and whites who sought union membership. Second, defendants failed to rebut plaintiffs' statistical case, either by offering their own statistical model showing an absence of disparate impact or by producing evidence of business justification or necessity. *Third*, plaintiffs proved, pursuant to established standards, that defendant International was aware of, and participated in, the discriminatory practices.

ARGUMENT

I. Neither *Watson* Nor *Wards Cove* Has Any Bearing On The Decision Below That Petitioners Violated Title VII And Section 1981.

Plaintiffs presented a straightforward disparate impact analysis under *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Specifically, as the court of appeals observed, plaintiffs proved statistically that, during the three-year period prior to suit, the classroom training barrier interposed by Local 201 and the International between experienced black rodmen and the journeyman exam disproportionately kept those black rodmen from taking that exam and thus obtaining admission to the union.[2] The court of appeals likewise held that plaintiffs' "evidence relating to Union admissions going back to 1967 . . . showed a statistically significant disparity between the proportion of eligible blacks and whites who became union members." Pet. App. 26a.

Local 201 seeks this Court's review by attempting to link the instant case to *Watson* v. *Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988), and *Wards Cove Packing Co.* v. *Atonio*, 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988). But none of the issues in those cases has any effect on the unanimous opinion of the court of appeals in this case. No purpose would be served either by granting Local 201's petition or deferring decision on it pending resolution of *Wards Cove*.

A. Local 201 first presents the recycled argument that plaintiffs' showing of causation between defendants' practices and the discriminatory impact was deficient. Local Pet. 9-13.[3] However, the court of appeals ruled that plaintiffs' *prima facie* case had focused on a specific employment practice: "[t]he 'specific procedure' under challenge is the requirement of classroom training

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[2] The court of appeals affirmed that the disparity was statistically significant (Pet. App. 19a-20a, 26a & n. 16), a determination which petitioners do not dispute.

[3] The court of appeals twice rejected the centerpiece of Local 201's petition—that plaintiffs made an insufficient showing of causation. *See* Pet. App. 29a-30a, 34a-36a; Pet. App. 89a. Local 201 argues that the decision in *Watson* and the grant of the petition in *Wards Cove* occurred after the court of appeals' principal decision in this case. Local Pet. 9-10. However, both decisions were issued one month before the court of appeals ruled on Local 201's petition for rehearing.

before experienced workers may qualify to enter the ranks of journeymen rodmen." Pet. App. 34a. Moreover, the court of appeals expressly rejected the argument Local 201 is making here—that plaintiffs had failed to show "a causal connection between the challenged practice and the alleged discriminatory result." Pet. App. 35a. Plaintiffs proved their case, as *Watson* contemplates (108 S. Ct. at 2788), by "identifying a 'specific employment practice"—the classroom training prerequisite for experienced applicants—and by showing that this practice caused the disparate impact. Pet. App. 34a-36a.

B. No other aspect of *Watson* requires further consideration of the decision below. This case does not involve promotions based on subjective criteria, as did *Watson*, but rather union admission procedures using objective, standardized criteria: a classroom training requirement for all union membership applicants, regardless of experience, as a prerequisite to taking the journeyman exam.[4] The court of appeals' opinion is a proper application of *Griggs* and is well within the framework of *Watson*.

C. Nor does the "comparative statistics" issue on review in *Wards Cove* pertain to this case. There, the Ninth Circuit relied on statistics showing that a disproportionate number of minorities held low-paying, unskilled jobs and a disproportionate number of whites held high-paying, skilled jobs for its holding that 16 different subjective criteria had a disparate impact on defendant's workforce. 827 F.2d at 444. The petition granted by this Court challenged that ruling for its failure to provide statistics keyed to any one employment practice, and for its reliance on statistics providing nothing more than a snapshot of the composition of defendant's workforce.

[4] A passage from the plurality opinion in *Watson* quoted by Local 201 makes clear that the evidentiary standards the opinion was describing were directed toward criteria which include subjective elements, not merely objective criteria:

> Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

108 S. Ct. at 2788-89 (citation omitted), cited at Local Pet. 11. Yet, as Local 201 concedes in its Questions Presented, the criterion at issue here is an "objective selection device." Local Pet. (i).

In contrast, the court of appeals here did not base its decision on statistics relating only to the racial composition of the union's membership. Nor did it fail to identify the particular employment *practice* that caused the disparate impact. The court of appeals identified the specific employment practice causing racial discrimination as the requirement that experienced black rodmen complete the Apprenticeship Program or the Training Program before taking the journeyman exam. The court of appeals also held that the discriminatory effect of this requirement was proven by comparing the racial composition of experienced rodmen seeking to take the journeyman exam to the racial composition of experienced rodmen admitted to the union.[5]

Local 201's petition erroneously argues that the Apprenticeship Program and the Training Program are somehow analogous to the routes to non-cannery and cannery employment in *Wards Cove*. Local Pet. 13. But the court of appeals here did not premise its ruling of discrimination upon a comparison of the percentage of blacks in the Training Program versus that in the Apprenticeship

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[5] Local 201 contends (Local Pet. 7), as it did below, that plaintiffs' statistical case improperly included apprentices in the "experienced pool." The court of appeals gave the argument appropriate short shrift:

> This argument suffers from a fatal flaw. Defendants' analysis focuses on black *participation* in the Apprenticeship and Training programs, rather than black *completion* of the programs (i.e., achievement of union membership).

Pet. App. 30a (emphasis in original). Local 201 claims, moreover, that apprentices should be subtracted *both* from the pool of applicants *and* the union membership. On this supposition, it argues that there would be no disparate impact. Local Pet. 11-14. Even assuming *arguendo* that not counting the examined apprentices has merit, correct application of Local 201's argument would require subtraction of these apprentices from the applicant pool *only*. This is because of "the unmanipulable nature of the figure of *actual* new members . . . ." Pet. App. 29a (emphasis in original). Removing apprentices, whom petitioners concede were predominantly white (Local Pet. 7), from the experienced pool would result in a bias in plaintiffs' favor and increase even more the deviation between the black composition of the applicant pool and the black composition of the group given an opportunity to take the exam. Plaintiffs' statistical approach, on this and other elements of the analysis challenged by defendants, was a proper and "conservative methodology." Pet. App. 25a; *see* Pet. App. 29a-30a.

Program, or on the racial composition of union membership generally. To reiterate, it based its ruling on a comparison of the percentage of blacks in the group of experienced rodmen who sought to become union members to the percentage of blacks in the group who became union members.[6]

D. In a final effort to gain review by this Court, Local 201 contends that the proper allocation of proof when a defendant has produced evidence that the challenged employment practices are based on legitimate business reasons is at issue here. It urges that this aspect of its petition be considered in light of *Wards Cove*.

No review is warranted on this basis because Local 201 presented no argument or evidence below on either a "business necessity" or a "job relatedness" defense.[7] Rather, defendants' entire defense was directed at contesting plaintiffs' statistical case. No defendant claimed that the challenged classroom prerequisite to the journeyman exam was based on legitimate business reasons.

> The record is, indeed, devoid of *any* affirmative rebuttal case—that is, seeking to prove by their own evidence that admission to union ranks was not racially disproportionate. We therefore

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[6] Local 201 seems to make a separate argument that the court of appeals' ruling that no named plaintiff had standing to challenge the high school diploma requirement for admission to the Apprenticeship Program means that statistics relating to examinees who completed the Apprenticeship Program are not relevant. *See* Local Pet. 7. This argument is wrong. The absence of a named plaintiff with standing to challenge the high school diploma requirement does not mean that statistics relating to defendants' use of the Apprenticeship Program as a prerequisite to the journeyman exam should be ignored in the analysis. As the court of appeals observed, plaintiffs' claim "is not that the Training Program or the Apprenticeship Program (setting aside the high school diploma requirement) were themselves discriminatory; rather it is that the requirement that the rodmen complete such a program before being allowed to take the journeyman examination worked discriminatory effects." Pet. App. 63a. Therefore, the courts below properly approved of the inclusion of those apprentices who actually took the journeyman exam in the "experienced pool" analysis.

[7] The plurality in *Watson* recognized that defendants have at least the production burden in connection with a business justification or necessity defense. 108 S. Ct. at 2790. Moreover, *Wards Cove* concerns the allocation of the burden of proof relating to a business necessity defense of *subjective* hiring criteria, in contrast to the *standardized* classroom training prerequisite challenged in this case.

> conclude, in light of our earlier analysis, that plaintiffs' prima facie case went unrebutted.

Pet. App. 40a (emphasis in original); *see* Pet. App. 150a-151a (Conclusions of Law 16, 18, 19). Thus, the court below "did not, in terms, formulate a 'business justification' test," as Local 201 appears to contend it should have. Local Pet. 15. The court had no need to do so, because no defendant offered any evidence on that subject. In fact, this Court is the first forum in which any defendant has attempted to raise the issue.

Contrary to Local 201's petition, the court below did not acknowledge "that the Local's practice of requiring classroom training for journeymen did, in *Watson's* words, further 'legitimate business reasons.' " Local Pet. 15. The court of appeals' general statements that unions may limit their size and are not required to admit unqualified individuals (Pet. App. 36a, 40a) cannot be distorted to suggest that the court approved the precise practice it held to be unlawful—the requirement of classroom training, regardless of experience, as a condition to taking the journeyman exam. Indeed, because defendant unions, during the so-called Open Period in part of 1971, permitted rodmen to take the journeyman exam solely on the basis of their experience in the trade, the court of appeals concluded "that the Union itself has not viewed an educational requirement as an absolute, minimum objective qualification." Pet. App. 39a. Thus, there was no conceivable business justification for defendants' discriminatory practice. As the court of appeals held, "the Union has, in effect, hoisted itself on its own petard, having chosen in the Open Period to treat experience alone as sufficient for admission to the journeyman exam. . . . In our view, *the Open Period establishes that experience can qualify one to be a journeyman rodman. . . .*" Pet. App. 39a (emphasis in original).[8]

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[8] As a third issue for this Court to review, Local 201 raises the court of appeals' assessment of plaintiffs' proof of disparate treatment. Local Pet. 9, n.7. However, Local 201 offers no reason for the Court to review this issue, and there is none. The court of appeals applied the well-established principle that statistical disparities themselves, when great enough, establish the discriminatory motive element of a disparate treatment case. *See, e.g., Hazelwood School District* v. *United States*, 433 U.S. 299, 307-08 (1977); *International Brotherhood of*

II. The Court of Appeals Correctly Affirmed The District Court's Ruling That The International Violated Title VII And Section 1981.

The court of appeals had "little difficulty concluding that the International's involvement in the membership practices of Local 201 was sufficiently extensive to subject it to liability under Title VII and section 1981." Pet. App. 51a. The court of appeals endorsed the district court's findings that "the International actively participated in and approved of Local 201's membership procedures." Pet. App. 63a. Accordingly, the court of appeals, applying established common law agency principles, affirmed the district court's determination that the International was liable.

A. On its review of the record, the court of appeals concluded that there was "overwhelming evidence of the International's awareness of and participation in Local 201's membership practices." Pet. App. 64a. The evidence amply supported the findings of the district court that: (1) the International at all times endorsed the existence of classroom training prerequisites for membership; (2) the International exercised significant control over the Apprenticeship Program and Training Program; (3) the International knew about Local 201's membership practices, the discriminatory effect of those practices, the racial imbalance in Local 201, and claims of discrimination against Local 201; (4) on at least two occasions, the International prescribed the membership test Local 201 employed; (5) the International created the Open Period and expressly instructed Local 201 to implement it; and (6) the International endorsed the system that "placed unnecessary barriers between *experienced* black rodmen and Union membership." Pet. App. 12a (emphasis in original); *see* Pet. App. 61a-64a; Pet. App. 138a-143a (Trial Findings 128-139).

Teamsters v. *United States*, 431 U.S. 324, 338 (1977); *McKenzie* v. *Sawyer*, 684 F.2d 62, 71 (D.C. Cir.1982). *General Building Contractors* v. *Pennsylvania*, 458 U.S. 375 (1982), cited by Local 201, merely reiterates the proposition that intent must be proven in a section 1981 case; it does not take issue with the principle, based on this Court's decisions, that statistical evidence may be used to prove intent.

The International ignores the "overwhelming" evidence (Pet. App. 64a) against it, making the bewildering assertions that "there was no evidence that the International knew that a disparate impact was occurring at Local 201" (Int'l Pet. 4) and that "[t]here was simply no evidence whatsoever in this case which showed that the International Union authorized, condoned or ratified the challenged conduct." Int'l Pet. 11. Similarly, the International claims that all of its activities "were designed to *increase* minority participation in . . . Local 201" (Int'l Pet. 14, emphasis in original), despite the finding that the International intentionally discriminated against experienced black permit workers. Pet. App. 63a-64a.

The International's assertions that the lower courts erred in finding the facts and reviewing those factual determinations would not warrant review by this Court, even if there were some support for those assertions in the record. *See Goodman* v. *Lukens Steel Co.*, 482 U.S. __, 96 L. Ed. 2d 572, 584 (1987). Here, there is no support for the International's factual claims.

B. The ruling against the International raises no issue of law warranting review. The court of appeals applied the test for international union liability established by *Carbon Fuel Co.* v. *UMWA*, 444 U.S. 212, 216-18 (1979)—the standard advocated by the International itself. Int'l Pet. 9. Contrary to the implication of the International's petition, the court applied the *Carbon Fuel* test *without* relying upon the International's constitution to support the imposition of liability. Int'l Pet. 11; *see* Pet. App. 59a-61a. Instead, the court focused on the International's conduct with respect to the membership practices at issue and found the International liable.

The International makes the absurd claim that the court of appeals' opinion conflicts with national labor policy and "could mean the end of the Labor Movement as we know it." Int'l Pet. 12, 13. The opinion, however, is just another in a long line of cases holding international unions liable under Title VII and section 1981 for discriminatory conduct at the local level.[9] It does not conflict

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[9] *See, e.g., Howard* v. *International Molders & Allied Workers Union*, 779 F.2d 1546, 1548 (11th Cir.), *cert. denied*, 476 U.S. 1174 (1986); *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 850-51 (5th Cir.), *modified on other grounds*, 556 F.2d 758, *cert. dismissed*, 434 U.S. 801 (1977); *Patterson* v. *American Tobacco*

with decisions of this Court or other courts of appeals. The International here did not merely attempt to mediate an isolated local dispute, as did the international union in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 738-39 (1969). Nor did the International take every reasonable step to bring Local 201 into compliance with the law, as did the international union in *Terrell* v. *U.S. Pipe & Foundry*, 644 F.2d 1112 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982). Rather, as the district court found, and the court of appeals affirmed, the International, over a period of several years, "actively participated in and approved of" the unlawful membership practices. Pet. App. 63a.[10]

Finally, upholding the International's liability in this case will not discourage other international unions from endeavoring to eliminate racial discrimination at the local union level. The court of appeals' decision will, if anything, deter international unions from creating, endorsing, or administering programs and policies that disproportionately discriminate against blacks seeking union membership. That result is entirely consistent with the purposes of Title VII and section 1981. *Cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975) ("It is the reasonably certain prospect of a backpay award that 'provide[s] a spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history,' " quoting *United States* v. *N.L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973)).

Co., 535 F.2d 257, 270-71 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 737-38 (5th Cir. 1976); *Kaplan* v. *IATSE*, 525 F.2d 1354, 1359-60 (9th Cir. 1975); *Wheeler* v. *American Home Products Corp.*, 19 FEP Cas. (BNA) 143, 146 (N.D. Ga. 1979); *Taylor* v. *Armco Steel Corp.*, 373 F. Supp. 885, 911-12 (S.D. Tex. 1973). *Cf. Goodman* v. *Lukens Steel Co.*, 96 L. Ed.2d at 584-87 (International and two local unions held liable under Title VII and section 1981).

[10] *Sinyard* v. *Foote & Davies Division of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978), also does not conflict with the rulings below. In *Sinyard*, the court refused to impose Title VII liability on an international union that had no involvement with the operations of its local. *Sinyard*, like the decision below, was decided on its facts. In the instant case, the facts established liability.

CONCLUSION

The court of appeals' decision applies sound principles of law established by this Court to the factual determinations of the district court. Neither Local 201 nor the International has presented any issue warranting review by this Court. The petitions for certiorari should accordingly be denied.

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No. 88-820

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IRON WORKERS REINFORCED RODMEN, LOCAL 201,
Petitioner,

v.

JESSIE BERGER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' attempt to harmonize their position here with the Court's position in *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777 (1988), is wholly unavailing.

1. With respect to the causation issue discussed in our petition at 11-14, respondents proudly, and repeatedly, assert that in this case, unlike in *Watson*, the plaintiffs did "'identif[y] a specific employment practice'—the classroom training prerequisite for experienced applicants." Resp. Br. at 6. But as we explained in our petition, *Watson* requires more than the identification of an employment practice; while identification is where "plain-

tiff must begin," 108 S. Ct. at 2788, *Watson* also requires that "[o]nce the employment practice at issue has been identified, *causation must be proved*." *Id.* (emphasis added). It is at that second point that respondents' case —and the court of appeals' analysis—collapses.

Respondents offer only a single sentence in an attempt to reconcile the decision below with the causation requirement of *Watson*. According to respondents:

> The court of appeals . . . held that the discriminatory effect of th[e experience] requirement was proven by comparing the racial composition of experienced rodmen seeking to take the journeyman exam to the racial composition of experienced rodmen admitted to the union.

Resp. Br. at 71. That is simply not what the court below held. The court of appeals in fact compared the racial composition of experienced rodmen seeking to take the exam with the racial composition of *all* rodmen admitted to the union, regardless of their experience. *See* Pet. at 6.

Indeed, had the court of appeals conducted the analysis suggested by respondents, it would have found not underrepresentation of blacks but underrepresentation of *whites*: whereas the racial composition of experienced rodmen was 45.9% black and 54.1% white, Pet. App. 122a,[1] the racial composition of experienced rodmen admitted to the union was 100% black and 0% white. This was because the only experienced rodmen who be-

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[1] Because "the Union does not keep statistics regarding applicants to take the exam . . . a proxy for identifying potential applicants had to be devised" in this case. Pet. App. 24a. The proxy that was used was "non-member permit workers with at least two years' experience." *Id.* at 25a. Of the 270 individuals meeting that criterion, 124 were black (45.9%) and 146 were white (54.1%). Pet. App. 25a-26a, 122a. (Due to a mathematical error, in our petition we erroneously stated the percentage of experienced blacks to be 47.7%. Pet. at 6.)

came union members during the relevant period were black participants in the affirmative action Training Program created for older minority workers. Pet. at 7.

Thus, respondents are simply wrong in suggesting that the decision below can be reconciled with this Court's decision in *Watson* which, as we noted in our petition, issued after the court of appeals ruled in this case. Accordingly, a remand to the court of appeals for reconsideration of the decision with respect to causation is required.

2. Respondents are equally incorrect in claiming that the justification issue addressed in our petition at 14-16 and currently pending before the Court in *Wards Cove Packing Co. v. Atonio*, No. 87-1387, was not raised in the courts below.

In the district court, the Local expressly argued, in its post-trial brief, that "the vast weight of the evidence showed that this [the rodman trade] is an apprenticeable trade *in which formal classroom training is a necessary adjunct to on-the-job experience.*" [2] The Local based that argument on testimony it had adduced at trial to the effect that:

> [T]here is no way anyone can learn the trade, our trade just by on-the-job-site training, working day to day in a sense that he will become a full fledged journeyman, knowing the full aspect of the trade as applied to the field.
>
> * * * *
>
> There is some phases of the work out here that you can't learn all of these in 2,000 hours or 4,000 hours or 8,000 hours unless you had someone programming the situation where you could go from one job to the

[2] Reply of Defendants Local 201 Apprenticeship Committee and Training Program to Plaintiffs' Post-Trial Brief at 6.

> next job and the next and get a different one each time. This is not the reality of things out there.[3]

Similarly, in the court of appeals the Local argued that the rodmen trade is a "skilled trade," that the purpose of the training requirement was "to produce competent and effective journeyman rodmen," that "[t]here was considerable evidence, unrefuted in the record, of the nature of, and the need for, this training," and that there was a "clear showing in the record that work experience alone does not constitute sufficient training in the craft."[4]

Thus, respondents are mistaken in suggesting that the Local failed to place in issue the legitimacy of its reasons for requiring classroom training as a prerequisite to becoming a journeyman rodman. And because, as we showed in our petition, the decision below rejecting the Local's justification for that requirement is inconsistent with the plurality opinion in *Watson* and raises one of the very issues posed in *Wards Cove*, this aspect of the case should be held for *Wards Cove*.

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[3] *Id.* at 8, quoting Tr. 1514-16; *see also id.* at 10, Tr. 1838 ("classroom instruction [is] necessary to be a competent rodman"); *id.* at 11-12, Tr. at 3044-46 (rodman skills "have to be acquired . . . [in a] classroom of some kind").

[4] Brief of Appellants Local 201, Apprenticeship Committee and Training Program at 13, 99, 122, 125.

CONCLUSION

For the foregoing reasons, the Court should defer action on the instant petition pending decision in *Wards Cove* and thereafter the Court should grant the instant petition and either (i) remand the case for further reconsideration in light of *Wards Cove* and *Watson* or (ii) set the case for plenary argument to resolve any questions posed here but not resolved in *Wards Cove*.

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